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# IN THE
# Supreme Court of the United States
## OCTOBER TERM, 1945

GULF OIL CORPORATION, *Petitioner*

v.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE & TRANSFER COMPANY, *Respondent*

## PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals, For the Second Circuit,**

## AND BRIEF IN SUPPORT THEREOF

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## PETITION FOR WRIT OF CERTIORARI

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*To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Gulf Oil Corporation, respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on February 4, 1946 (Judge Augustus Hand dissenting), reversing the District Judge's order granting the Petitioner's motion that the Court refuse jurisdiction of the action because of inconvenience of the forum. A petition for rehearing was denied on February 23, 1946. (R. 77.)

### Statement.

Respondent, a resident of Virginia, brought this action against Petitioner, a Pennsylvania corporation,

on an action in *tort* which arose in Virginia. Although Petitioner transacts some business in New York, none of its business transactions in that state has any relationship or connection, directly or remotely, with the matters occurring in Virginia which respondent claims constitute his cause of action. (R. 18, f. 53.) The claimed venue and jurisdiction of the action in the United States District Court for the Southern District of New York is on the ground that petitioner, in conformity with Section 210 of the General Corporation Law of New York, appointed an agent for service. Petitioner appeared specially in the District Court for the purpose of a motion to dismiss the complaint, which was granted. (62 Fed. Supp. 291)

Judge Hand filed a dissenting opinion in the lower court and because of his succinct statement of the facts we take the liberty of quoting his opinion:

> "I think that the rule of *forum non-conveniens* may be applied in cases brought in the United States Courts, whether the jurisdiction be founded on diverse citizenship or may arise for other reasons, except where Congress has prescribed a different rule. This result seems to be implicit in the opinions of both majority and minority in *Baltimore & O. R. Co. v. Kempner*, 314 U. S. 44, and *Miles v. Illinois Central R. Co.*, 315 U. S. 698, and to follow explicitly from the opinion of Justice Douglas in *Williams v. Green Bay and Western Railroad Co.*, decided January 7, 1946. See also *Meredith v. Winter Haven*, 320 U. S. 228. Indeed, the final paragraph of the opinion in *Williams v. Green Bay and Western Railroad Co.* discussed whether the maintenance of that suit in the Southern District of New York was

to be regarded as 'vexatious or oppressive' in view of the availability of witnesses there and of the presence in that district of most of the defendant's directors and of its corporate records, transfer and minute books. Therefore, the question before us is simply whether in the present case the District Judge was justified in concluding that the maintenance of the action in the Southern District of New York, rather than in the Virginia District in which the plaintiff resided and the alleged tort occurred, was unduly burdensome to the defendant. I cannot see that anything is involved in the case at bar but the determination of whether the bringing of the action in New York was vexatious. While Judge Leibell in declining jurisdiction and granting the defendant's motion to dismiss the complaint attempted to apply the New York rule of *forum non-conveniens* the issue was not one of substantive law but of procedure in the federal courts so that under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, the New York decisions were pertinent only as instructive precedents and not as pronouncements of rules of law binding on the United States courts. Nevertheless the New York rule of forum non-conveniens in an action in tort like the present would not seem to differ from that of the federal courts for it cannot be supposed that in either jurisdiction a distinction would be made between personal torts and tortious injuries to property like those asserted in the case at bar. See *Murman v. Wabash Ry Co.*, 246 N. Y. 244; *Wedemann v. United States Trust Co.*, 258 N. Y. 315; *Gregonis v. P. R. R. C. & I. Co.*, 235 N. Y. 152. Under the circumstances I think Judge Leibell exercised sound judgment in holding that under the rule of *forum non-conveniens* the jurisdiction of the Southern District Court was not properly invoked. Indeed the rea-

sons which impelled his decision were the same that in *Davis v. Farmers Co-operative Co.*, 262 U.S. 312, moved the Supreme Court even to deny jurisdiction in actions against railroads brought in districts remote from those in which the torts were committed and in which the plaintiffs did not reside, on the ground that they would involve unreasonable burdens upon interstate commerce.

"The affidavits show that some three hundred and fifty claimants having property stored in plaintiff's warehouse reside in or about Lynchburg, Virginia, where the fire caused by defendant's alleged negligence occurred. Defendant's affidavits also say that the Jennings-Watts Oil Co., whose driver delivered the gasoline for the defendant to the plaintiff's warehouse, has its business in Lynchburg; that various persons, including firemen, police officers and other municipal employees, who will be necessary witnesses in respect to the plaintiff's gasoline storage and dispensing plant and its conformity with the local laws and ordinances, and the condition of the truck which delivered the gasoline are there; and several engineers and expert witnesses for the defendant reside in and about Lynchburg. The only answer of the plaintiff to these affidavits which would seem to have any importance is that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition; but there is no indication of how many of these witnesses there are and there is likelihood that they will be relatively few now that hostilities have ceased. The suggestion that the plaintiff will bring witnesses to New York gives the defendant no assurance that it can obtain those it needs without being compelled to rely chiefly on depositions. If there was ever a case where an effective defense was likely to be prevented and the plaintiff would be given

undue advantage by a trial in New York I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary and the order declining jurisdiction should be affirmed." (R. 65.)

In addition to the facts stated by Judge Hand in his opinion, petitioner made the following showing:

The principal amount which respondent seeks to recover represents losses sustained by the three hundred and fifty persons who had their goods stored in his warehouse. (R. 15, f. 45.) It will be necessary that proof be made through them as to the value of such goods which it is claimed they lost. (R. 15, f. 45.)

Jennings-Watts Oil Company, Inc., operates its business in Lynchburg, Virginia, under a contract between it and petitioner. (R. 17, f. 51.) The contract in question contains an indemnity clause protecting petitioner from damage or injury to others growing out of the negligence of Jennings-Watts Oil Company's employees. (R. 17, f. 51.) It will be impossible to implead this Virginia corporation in the case if the action is maintained in New York. (R. 17, f. 51.) There are some, and probably will be many more, claims and suits filed by numerous customers of respondent who sustained losses as a result of the fire in question. (R. 18, f. 54.) Some of these parties have already instituted suit in the courts of Virginia against respondent; others have filed claims against Jennings-Watts Oil Company, Inc. (R. 18, f. 54.) Generally, all of the witnesses and prospective parties litigant in all such actions are *residents of Lynchburg, Virginia, and vicinity and are beyond the reach of the*

*processes of this Court.* Lynchburg, Virginia, is approximately 417 miles from New York City. Transportation and hotel facilities at the present time are, and for the next several months will be, very difficult to obtain. (R. 24, f. 71.) Some of the witnesses have already indicated their *unwillingness to appear in New York,* and most, if not all, of the others will likely do so. (R. 22, f. 65.) The issues of negligence and damage cannot be developed by either party to this suit without the testimony of these witnesses and proof of ordinances and statutes. There are available to respondent in the city of his residence, Lynchburg, Virginia, both State and Federal courts with sufficient jurisdiction and venue to entertan this action and with power to call before it all the material witnesses. Such courts could obtain jurisdiction of the persons of all necessary and proper parties to this action and of the subject thereof. (R. 19, f. 55.) Petitioner transacts business in Virginia and has appointed an agent for service in that state. (R. 38, f. 113.) The District Court, on August 18, 1945, granted petitioner's motion and dismissed the complaint. (R. 54-55, ff. 162-165.) The District Judge's reasons for exercising a sound discretion in deciding whether or not the Court should assume jurisdiction over this action are found in his opinion handed down on July 30, 1945. (R. 44-54, ff. 132-160.)

**Jurisdiction.**

This Court has jurisdiction under Judicial Code, Section 240, Subdivision (A), as amended by the Act

of February 13, 1925, Title 28, Section 347 (A), U. S. Code.

**Opinion of the Court Below.**

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported. It appears at pages 59-67 of the record.

**Questions Presented.**

1. Whether the rule of forum non-conveniens may be applied in a case brought in the United States District Court for the Southern District of New York by a resident of Lynchburg, Virginia, against a Pennsylvania corporation, on an alleged tort arising in Virginia, and where the Pennsylvania corporation, in conformity with Section 210 of the General Corporation Law of New York, appointed an agent for service, although none of its business transactions in New York has any relationship, directly or remotely, with the matters occurring in Virginia which respondent claims constitute his cause of action.

2. Whether the action of the United States District Judge in declining to assume jurisdiction of the action amounts to an abuse of discretion where it was shown by undisputed facts that respondent is a resident of Lynchburg, Virginia; petitioner is a Pennsylvania corporation; that all matters which it is claimed constitute the cause of action arose in Virginia; that there are some 350 persons residing in and around Lynchburg, Virginia, who had goods stored in respondent's warehouse which were destroyed by the fire in question; where the issues of negligence,

contributory negligence, the responsibility for the fire and the question of damages will be closely contested and where all the witnesses who will be called upon to testify with respect to the issues involved reside in and around Lynchburg, Virginia.

**Reasons Relied Upon for the Allowance of the Writ.**

1. There is here presented for decision an important question of Federal law which has not been, but should be, settled by this Court.

2. Because the Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which conflicts directly with a decision handed down by the lower court on the same day, to wit— *Eugene Koster v. Lumbermens Mutual Casualty Company and James S. Kemper and James S. Kemper & Co., Inc., decided February* 4, 1946.[1]

In *Koster v. Lumbermens Mutual Casualty Company, et al., supra,* the well-established rule was followed that the doctrine of forum non-conveniens may be applied in cases brought in the United States Courts where the maintenance of that suit in the Southern District of New York was to be regarded as "vexatious and oppressive" in view of the convenience of witnesses and efficiency and that justice might be done to all parties concerned. In the case at bar the holding of the majority is that no discretion exists to decline jurisdiction of imported tort litigation on the grounds of forum non-conveniens.

3. Because the case involves a question of gravity and general importance which it is in the public in-

terest to have decided by the court of last resort. The question involved is far-reaching in its application and importance. The decision by the majority of the Circuit Court of Appeals has an important bearing on permitting importation of tort litigation.

**Prayer.**

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket *No.* 20,049, *Cornelius Gilbert, Appellant, v. Gulf Oil Corporation,* Appellee, to the end that that cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as this Court may deem proper.

GULF OIL CORPORATION,
*Petitioner.*

By MATTHEW S. GIBSON,
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ARCHIE D. GRAY,
1710 Gulf Building,
Houston, Texas.

*Counsel for Petitioner.*

April , 1946.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### Opinion of the Court.

The opinion of the Court below has not been officially reported. It is dated February 4, 1946, and appears on pages 59-67 of the record.

### Statement of the Case.

This has already been stated in the preceding petition on pages 2-6, which is here adopted and made a part of this brief.

### Specifications of Error.

The Circuit Court of Appeals erred:

I.

In not holding that the doctrine of forum non conveniens applied in this cause.

II.

In not holding that the disposition of the motion by the District Judge in declining to assume jurisdiction of this action did not constitute abuse of discretion, under the facts here disclosed.

**Argument.**

This is a case localized from every standpoint in Lynchburg, Virginia; yet it was taken to New York City for trial. Unlike those cases arising under the Federal Liability Act, which prompted Mr. Justice Jackson in *Miles v. Illinois Central Company*, 315 U. S. 698, to put it, that the effect of the Act's venue provisions is to permit a plaintiff to "*go shopping for a judge or jury inclined to be more favorable than he would find in his home forum,*" there is no Federal statute which denies the application of the rule of forum non conveniens to this class of action. The reasons why respondent will impose upon both adversary and himself the inconvenience of trying a lawsuit hundreds of miles away from the situs of the alleged tort are discussed in Mr. Justice Jackson's concurring opinion in *Miles v. Illinois Central Company, supra.* Respondent does it for several reasons —to get more money, or to prosecute cases where insurance companies with subrogation contracts reside. These reasons are not sufficient to account for all the importation of litigation that is going on. That the distant forum places petitioner at an unfair disadvantage is obvious. The practice deprives a defendant of all reasonable opportunity to defend itself on

the factual issues in such cases because it is unable to obtain the attendance of witnesses whose oral testimony is essential to an adequate and understandable presentation of the facts on which such claims are based. In this case, liability of petitioner depends upon whether it was or was not negligent in certain of its operations, *localized in Lynchburg, Virginia,* or whether the respondent was guilty of contributory negligence in several particulars and, ordinarily, such operations cannot be made intelligible to the average juror except by oral explanation (and frequently with the aid of maps, models or other exhibits) by those who actually operate or work about the particular instrumentalities involved. Usually, such explanations cannot be made adequate or understandable by witnesses testifying by deposition only; and because of the inability of jurors to determine intelligently the credibility of such *unseen* witnesses or the probative force of their testimony, such evidence is disregarded or given scant consideration, even though it would have been given full weight had it been presented orally in the presence of the jury.

Since all of the witnesses reside in another state they cannot be compelled to testify in the courts of New York and, as shown by the record (p. 22, f. 65) one of the most important of these witnesses has expressed his unwillingness to leave his place of business in Lynchburg, Virginia, and go to New York for the purpose of testifying in this trial. This witness owned the truck that was making the delivery of gasoline to respondent's place of business at the time

the fire occurred. The importance of his testimony is therefore obvious. The practice of importing into distant forums this type of litigation likewise prevents a view by the jury of the premises, facilities or instrumentalities involved, and thereby encourages and facilitates confusion, distortion and misrepresentation of the pertinent physical facts. Such confusion operates to the advantage of a plaintiff asserting a claim of doubtful merit. Such practice enables the claimant in such a case to take the defendant by surprise by offering testimony and making factual contentions which such defendant may have no reason to anticipate and which it cannot meet because of its inability to obtain witnesses on short notice and from far distant places during the course of the trial.

The abuse of importing litigation from distant points is well illustrated by cases arising under the Federal Liability Act. The venue provisions of that Act prevent judges from declining jurisdiction of an imported case on grounds of forum non conveniens. *Union Pacific Railway v. Utterback,* 173 Ore. 572, 146 P. (2) 76; *Miles v. Illinois Central Company,* 315 U. S. 698. No such reason exists in this class of action, and there is no sound reason to destroy utterly this doctrine *by case law.* There is no reason to doubt that the judges would exercise the power with wisdom and discretion. The concentration of litigation in certain places, regardless of convenience of the parties, or the ends of justice thereby served, is obviously an evil.

Although Congress has not prescribed a different rule, the majority holding of the Circuit Court is in

effect that the United States courts cannot apply the rule of forum non conveniens to tort claims involving property damage while on the same day the same court handed down another decision (by two different judges) in which the majority held that the doctrine of forum non conveniens *does apply* in a derivative action where the maintenance of the suit in New York will be so vexatious and oppressive that "considerations of convenience, efficiency and justice point to the courts of the state of domicile as appropriate tribunals for the determination of the particular case." *Eugene Koster v. Lumbermens Mutual Casualty Company, et al., decided February* 4, 1946 —*Second Circuit.*

From the facts set forth in petitioner's supporting affidavits to its motion to dismiss (R. pp. 14-24, 34-39) and the decisions of the New York courts, both Federal and State, there is nothing which suggests any good reason why the District Court should accept jurisdiction of this action. There is nothing in the case beyond the possible convenience of respondent's counsel which suggests that it might be better tried in New York than in Virginia, the situs of the alleged tort. To the contrary, every substantial element involved suggests that the District Court should decline jurisdiction. Complete justice to all concerned cannot be done in the District Court. The trial of this action in the District Court will be attended with difficulties which would be avoided without hardship to respondent if this action is brought in the jurisdiction where service can be had on all witnesses and all

necessary and proper parties may be brought before the court and where the cause of action arose.

*Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377, involved the construction of the New York act relating to suits by non-residents against foreign corporations. The suit was under the Employers' Liability Act for personal injuries. The injuries were inflicted in Connecticut. Plaintiff was a citizen and resident of that state while defendant was a Connecticut corporation although doing business in New York where the suit was brought. Upon motion the trial court dismissed the action on the assumption that the statutes of New York gave it a discretion in the matter. The contention was made that under the Employers' Liability Act no such discretion existed and that the Court was without authority to decline jurisdiction. Justice Holmes, who wrote the opinion, overruled the contention by saying:

> "There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned." (p. 387.)

And

> "Thus it is established that the statute purports to give to the court the power that it exercised." (p. 385.)

The Court of Appeals in that case based its per curiam decision on *Murnan v. Wabash Ry. Company* (246 N. Y. 244). This Court, in affirming the *Douglas* case, *supra*, approved the reasoning of the New York

Court of Appeals and cited *Gregonis v. Philadelphia &R. Coal & Iron Co.*, 235 N. Y. 152.

*Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, 139 N.E. 223, at page 226 held:

> "On the other hand, by a long line of authorities the courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committeed in a foreign state, where both the plaintiff and the defendant were non-residents. Pietraroia v. New Jersey & Hudson R. Ry. & Ferry Co., 197 N. Y. 434, 91 N.E. 120; Hoes v. New York, N. H. & H. R. Co., 173 N. Y. 435, 66 N.E. 119; Hutchinson v. Ward 192 N. Y. 375, 85 N.E. 390, 127 Am. St. Rep. 909; Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619; Zeikus v. Florida East Coast R. Co., 144 App. Div. 91, 128 N. Y. Supp. 933."

*Murnan v. Wabash Ry. Co.*, 246 N. Y. 244, 158 N.E. 508, 509, held:

> "The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another state. The practice may be anomalous, but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude, that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister state. He may not be cast out because he is suing under the act of

Congress. He may not enforce his rights merely because he is suing under the act."

In 1920, the same ruling was made in *Waisikowski v. Philadelphia & Reading Coal Co.*, 228 N. Y. 581.

In 1943, Mr. Justice Lee Parsons Davis, in *Williamson v. Palmer*, 43 N. Y. S. 2d 532, held that the courts of New York may either accept or decline jurisdiction as a matter of discretion in an action by a non-resident against a foreign corporation (the New York, New Haven & Hartford Railroad Company), which had designated a process agent as a condition of being authorized to do business in the state, where the cause of action sounded in tort and arose outside the State of New York, citing the *Gregonis* and *Murnan* cases.

From a review of these cases it is apparent that the rule applies whether or not the foreign corporation doing business in New York has designated a process agent in conformity with Section 210 of the General Corporation Law of New York.

The Legislature has re-enacted the provision relative to suits by non-residents against foreign corporations without change on two separate occasions during the period when it was being so construed by the courts (Laws 1920, Chapter 916 and Laws of 1929, Chapter 650); and, in 1936 when petitioner qualified to do business in New York, the rule had become statutory.

The same rule was recognized and applied in *Panstowowe Zaklady Graviozne v. Automobile Ins. Co., of Hartford* (2d Cir.), 36 F.2d 504:

"The fact that the defendant railroad company

is engaged in business in the state, and by doing business here has consented to be sued here, is no basis for the assertion of jurisdiction of actions by non-residents which arise in other states and which are entirely disconnected with the business it does here. Simon v. Southern Ry., 236 U. S. 115, 130, 35 S. Ct 255, 59 L. Ed. 492; Old Wayne Life Ass'n. v. McDonough, 204 U. S. 10, 22, 27 S. Ct. 236, 51 L Ed. 345." (Judge Thatcher.)

The clear, logical and sound pronouncements set forth in Mr. Justice Holmes' opinion in the *Douglas* case, *supra,* is but a succinct reaffirmation of the doctrine adopted and applied by both the New York and Massachusetts jurisdictions. It is not mere rhetoric to suggest that the opinion of the Court below in its disposition of this case all but emasculates a doctrine which has been regarded as a sound judicial principle and well established doctrine.

In *Universal Adjustment Corp. v. Midland Bank,* 281 Mass. 303, 184 N.E. 152, it is held (at pp. 158 and 159):

"Where it appears that complete justice cannot be done here, that the defendant will be subjected to great and unnecessary inconvenience and expense, and that the trial will be attended, if conducted here, with many if not insuperable difficulties which all would be avoided without special hardship to the plaintiff if proceedings are brought in the jurisdiction where the defendant is domiciled, where service can be had, where the cause of action arose and where justice can be done, our courts decline to take jurisdiction on the general ground that the litigation may more appropriately be conducted in a foreign tribunal. Stated succinctly, the principle is that where in

a bro. l sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum. * * *

"Whether the circumstances of a particular case bring it within the scope of the doctrine of forum non conveniens must depend upon a close scrutiny of the relevant facts. Those facts were found and succinctly stated by the trial judge. They have been set forth earlier in this opinion. This being an action at law, findings of fact if supported by any reasonable interpretation of the evidence with all its legitimate inferences, must stand and be accepted as true. Moss v. Old Colony Trust Co., 246 Mass. 139, 143, 140 N.E. 803. It is not necessary to review the evidence. It amply sustains the findings made. So far as they relate to foreign law, they were warranted by the testimony of an English barrister and the decisions of English courts to which he drew attention.

"The collective force of these findings, which need not be repeated, demonstrates that the case can be much more easily and effectively tried in England than here, that great and needless expense to the defendant will thus be avoided, and that substantial justice with reference to rights of claimants and proof of foreign law will be much more readily accomplished by a trial in England than here."

*Wedemann v. U. S. Trust Co.*, 258 N. Y. 315, 179 N.E. 712, is authority for the proposition that the selection of the situs of a cause of action held by one non-resident against another depends generally upon a *"common sense appraisal of the requirements of justice and convenience in particular conditions."*

See also *Levy v. Pacific Eastern Corp.* 275 N. Y. S. 291; *Rogers v. Guaranty Trust Co.*, 288 U. S. 123; *Blaustein v. Pan American Oil Co.*, 21 N. Y. S. (2) at p. 706.

Petitioner's motion was grounded upon the familiar doctrine of forum non conveniens. Mr. Justice Frankfurter in *Baltimore and Ohio R. Co. v. Kepner*, 314 U. S. 44, 55, 56, 57, 61 (dissenting opinion), states the rule applicable to this motion. It is there stated (pp. 55, 56) that the majority opinion does not

> "question the familiar doctrine of forum non conveniens under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 423, 76 L. Ed. 837, 842, 843, 52 S. Ct. 413; Massachusetts v. Missouri, 308 U. S. 1, 19, 84 L. Ed. 3, 10, 60 S. Ct. 39; Rogers v. Guaranty Trust Co., 288 U. S. 123, 130, 131, 77 L. Ed. 652, 656, 657, 53 S. Ct. 295, 89 A. L. R. 720. These manifestations of a civilized judicial system are firmly imbedded in our law. See Foster Place of Trial in Civil Actions, 43 Harvard L. Rev. 1217; Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Columbia L. Rev. 1.
>
> "* * *
>
> "The amendment of 1910 greatly enlarged the range of a plaintiff's convenience in bringing suit. It is not undisputed that the amendment was intended to open to a plaintiff courts from which he previously was barred. But that is not the question before us. The problem is whether the Act was intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses,

thereby not only depriving state courts of their old power to protect against unjustly oppressive foreign suits, but also forbidding federal courts to decline jurisdiction 'in the interest of justice' on familiar grounds of forum non conveniens. See Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 423, 76 L. Ed. 837, 842, 843, 52 S. Ct. 413." (p. 57.)

* * *

"Moreover, this Court has expressly held that the venue provision of the Employers' Liability Act does not prevent a state court from declining jurisdiction as a forum non conveniens. Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355." (p. 61.)

See also *U. S. Merchants & Shippers Ins. Co. v. A/S Den Norske A. Og A. Line* (CCA 2) 65 F.2d 392, and *Charter Shipping Co. v. Bowring,* 281 U. S. 515, 518.

In a similar case embracing the doctrine of forum non conveniens ( *Miles v. Illinois C. R. Co.,* 315 U. S. 698), Mr. Justice Jackson, in concurring with the majority opinion, stated:

"So viewed, the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum. An advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them. And that is what makes railroads seek injunctions such as this one.

"*The judiciary has never favored this sort of shopping for a forum. It has sought to protect its own good name as well as to protect defend-*

*ants by injunctions against the practice of seeking out soft spots in the judicial system in which to bring particular kinds of litigation.* * * * If Congress had left us free to consult the ultimate public interest in orderly resort to the judicial system I should agree with Mr. Justice Frankfurter's conclusion. But the plaintiffs say that they go shopping, not by leave of the courts themselves, but by the authority of Congress. (p. 706.)

"* * *

"I do not, however, agree with the statement in Mr. Justice Reed's opinion that 'the Missouri court here involved must permit this litigation.' It is very doubtful if any requirement can be spelled out of the Federal Constitution that a state must furnish a forum for a non-resident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose." (p. 708.) (Emphasis supplied.)

While the majority opinion in the lower court makes reference to the case of *Nierbo Company v. Bethlehem Shipbuilding Corporation,* 308 U. S. 165, it is submitted that the question of inconvenience to the parties of a local trial was never raised or considered in said case.

Petitioner's affidavit in support of its motion (R. 38, ff. 113-114) reflects that the United States District Court for the Western District of Virginia, at Lynchburg, Virginia, had jurisdiction to entertain and try this action and can obtain primary jurisdiction of this petitioner.

We submit that under the record the dissenting opinion of Judge Augustus Hand correctly disposed of the real issues in this case in the following language:

*"If there was ever a case where an effective defense was likely to be prevented and the plaintiff would be given undue advantage by a trial in New York I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary, and the order declining jurisdiction should be affirmed."* (Emphasis supplied.) (R. 67.)

**Conclusion.**

It is respectfully submitted that the writ of certiorari prayed for in the petition should issue.

Respectfully submitted,

GULF OIL CORPORATION,
*Petitioner.*

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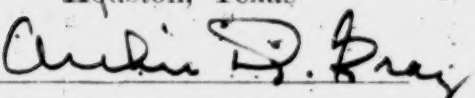

*Counsel for Petitioner.*

# APPENDIX

## UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 86—October Term, 1945.
(Argued November 8, 1945
Decided February 4, 1946.)
Docket No. 19927

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EUGENE KOSTER, *Appellant*,

v.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, *Appellee*,

and

JAMES S. KEMPER AND JAMES S. KEMPER & CO., INC., *Defendants*.

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Before:

SWAN, CHASE AND CLARK,

*Circuit Judges*.

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Appeal from the District Court of the United States for the Southern District of New York.

Derivative action by a policy holder in a mutual insurance company to require one of its directors and another defendant to account to it for diverting assets. From a judgment dismissing the complaint with-

out prejudice to suit in a different forum, the plaintiff appeals.

ALFRED GURKIN, *Attorney for appellant;* Abraham L. Pomerantz and William E. Haudek, of counsel.

TOWNLEY, UPDIKE & CARTER, *Attorneys for appellee;* Stuart N. Updike, of counsel.

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SWAN, *Circuit Judge*:

This is a derivative action brought in the federal court on the ground of diverse citizenship. The plaintiff, a resident of the Eastern District of New York, is the holder of an automobile liability policy issued by (American) Lumbermens Mutual Casualty Company, a mutual insurance company organized under the laws of Illinois and licensed to do business in New York. For brevity the company will hereafter be called Lumbermens. The other defendants are James S. Kemper, who resides in Illinois and is an officer and director of Lumbermens, and James S. Kemper & Co., an Illinois corporation controlled by Mr. Kemper. In the right of Lumbermens and on behalf of all its policy holders, the plaintiff's complaint charges Kemper and the Kemper company with diversion of Lumbermens' assets and asks that they account to it for profits and damages. There are four causes of action pleaded: the first charges that Kemper dominated Lumbermens and caused it to pay him exces-

sive salary for which he gave no consideration; the second charges that he caused Lumbermens to pay the Kemper company unwarranted commissions and fees; the third and fourth charge that he caused Lumbermens to sell to him and other persons allied with him various securities at less than their value. Lumbermens moved to dismiss the complaint on the ground of (1) *forum non conveniens,* and (2) absence of an indispensable party, James S. Kemper not having been served. The motion was granted and the complaint was dismissed without prejudice. The plaintiff has appealed.

Since James S. Kemper is the only defendant against whom relief is sought in counts one, three and four, it is obvious that the causes of action alleged in those counts cannot proceed to trial unless Mr. Kemper can be served within the jurisdiction of the court. But it would have been premature to dismiss the complaint for lack of service on him during the two months which intervened between the filing of the complaint and the Lumbermens' motion to dismiss.[1] Moreover Mr. Kemper was not an indispensable party to the cause of action asserted in count two against Kemper & Co. Its liability rests upon participation in the alleged wrongdoing of Kemper as a fiduciary of Lumbermens, and there is no reason why such liability cannot be tried without Kemper's presence as a party. Therefore dismissal could not properly be rested on the absence of an indispensable

1 Rule 1 of the civil rules of the District Court for the Eastern District of New York allows one year from the filing of the complaint to make service. Cf. *Hackner* v. *Guaranty Trust Company,* 117 F. 2d 95 at 99 (C. C. A. 2).

party; nor was it. The motion was granted because, as stated in the district court's opinion, "the suit relates to the internal affairs of a foreign corporation" and "the convenience of witnesses and efficiency and justice demand that the courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case." Hence the question presented for decision by this appeal is whether the doctrine of *forum non conveniens* justified dismissal of the action. The appellant relies upon the rule that where jurisdiction is conferred on a federal court its exercise of jurisdiction is mandatory, and only in exceptional cases of a stereotyped character has the court discretion to decline it. *Meredith v. Winter Haven,* 320 U. S. 228, 234; *Williams v. Green Bay & Western R. R. Co.,* U. S. (Jan. 7, 1946); *Griffith v. Bank of New York,* 147 F.2d 899, 904 (C. C. A. 2). Controversies which involve interference with the internal affairs of a foreign corporation fall within one of the well recognized exceptions. *Rogers v. Guaranty Trust Co.,* 288 U. S. 123; *Weiss v. Routh,* 149 F.2d 193 (C. C. A. 2). But as Mr. Justice Douglas pointed out in the recent *Williams* case, *supra,* where only a money judgment is sought, the court will normally entertain jurisdiction, even though internal affairs are in some sense involved. In the case at bar, the insurance company is nominally a defendant but in essence is the plaintiff in an action which seeks an accounting for the waste and diversion of corporate assets by a faithless director and (in count two) by a corporation alleged to have participated in the fidu-

ciary's wrongdoing. Inquiry into the conduct of the directors of the insurance company will be required but no such supervision into its internal affars as to make the courts of Illinois a more appropriate forum than those of New York. Consequently, assuming for the moment that the plaintiff, as a policy holder in a mutual company has the same right as would a shareholder in a stock company to bring a derivative action on the corporation's behalf, the district court should not decline jurisdiction on the ground that the action involves the internal affairs of a foreign corporation.[2]

The parties are in dispute as to whether a policy holder has the same standing as a stockholder to bring a derivative action against a faithless fiduciary. The plaintiff asserts that the answer to this question depends upon the law of New York. We think not. Whether a person is a shareholder or other member of a corporation is determined by the law of the state of incorporation. *Gallup v. Caldwell*, 120 F.2d 90, 93 (C. C. A. 3); A. L. I. Restatement of Conflict of Laws, §182. And the rights of a policy holder in a mutual company to bring a derivative action are likewise governed by the terms of his contract under the law of the company's domicile. *Haynes v. Fraternal Aid Union*, 54 F.2d 305 (D. C. Kans.). The law of Illinois on

2 While a federal court is not bound to follow state cases in respect to discretionary declination of jurisdiction—*Gilbert* v. *Gulf Oil Corporation* (C. C. A. 2, January 4, 1946)—it is interesting to note that the New York courts would not have declined jurisdiction had this been a derivative suit by a shareholder in a stock corporation. *Miller* v. *Quincy*, 179 N. Y. 294; *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388; *Goldstein* v. *Lighther*, 266 App. Div. 357, aff'd 292 N. Y. 670.

this point is not wholly clear. *People ex. rel. Benefit Association of Railway Employees v. Miner*, 387 Ill. 393, *cert. den.*, U. S. , is relied upon by the appellee as indicating that a policy holder cannot bring a derivative action. That case was distinguished, however, in *Winger v. Chicago City Bank & Trust Co.*, 60 N.E.2d 560, 570 (Ill. App.) which sustained a derivative suit for the recovery of assets. In reason we see no valid distinction between a stockholder's and a policy holder's derivative suit seeking relief of this character. As we said in *Goldstein v. Groesbeck*, 142 F.2d 422, 425, "A shareholder's suit in essence is nothing more than a suit by a beneficiary of a fiduciary to enforce a right running to the fiduciary as such." With respect to its cause of action against a faithless director, the company is a trustee for the policy holders who will benefit by its recovery of diverted assets. Even if there were more doubt than appears to us as to the plaintiff's right under Illinois law to sue on behalf of the company, such doubt "is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." *Williams v. Green Bay & Western R. R. Co.*, *supra*.

Nor can non-exercise of federal jurisdiction be rested, in our opinion, on the theory that the court's action might interfere with the functioning of the state administrative agency which supervises insurance companies. For reasons stated in the *Winger* case, *supra*, the type of relief sought will not so interfere.

The issue really comes down to whether maintenance of the suit in New York will be so vexatious or oppres-

sive that "considerations of convenience, efficiency and justice point to the courts of the state of domicile as appropriate tribunals for the determination of the particular case." See *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 131. On this issue the district court's opinion mentions as pertinent considerations the following facts derived from an affidavit by Lumbermens' secretary:

> "Lumbermens does business in every one of the 48 states. It employes approximately 2,144 persons, 750 of whom are employed in the Chicago offices, the home and principal place of business of Lumbermens since its organization. All of the general records relating to the business of Lumbermens are maintained in Chicago or warehouses located closely thereby. Lumbermens has seven directors, five of whom are residents of the State of Illinois having regular places of business in the City of Chicago. The other officers are residents of the State of Illinois. None of the records necessary for the trial of the issues of this action and none of the witnesses who apparently have any knowledge of the acts alleged in the complaint live outside the State of Illinois, and most of the witnesses and all of the records are in and about the City of Chicago.
>
> "There will be involved in the trial of this action the transportation of large quantities of records from Chicago to this District. There will also be involved the traveling expenses and subsistence of witnesses for examination before trial of directors, officers and employees of Lumbermens and the attendant loss of time of these witnesses when they come to this District. If the defendant is successful, it would be most unjust to require the tremendous expense involved, and this is true should the plaintiff be successful.
>
> * * * * *

> Another item to be taken into consideration is the extreme emergency with respect to transportation and hotel accommodations which now exists and which will undoubtedly exist for some time to come."

The secretary's affidavit also states that the plaintiff became a policy holder in May, 1941, and since that date has paid to Lumbermens total premiums of less than $250; and if plaintiff were entirely successful in his suit the net effect of the recovery by Lumbermens upon plaintiff's interest in the company would be an increase, negligible in amount, in the dividends applicable to his policy. None of the foregoing facts was controverted by the plaintiff. He relied solely on the legal proposition that the exercise of jurisdiction was mandatory. In that he is in error. The last paragraph of the opinion in the *Williams* case, *supra,* implicitly recognizes that jurisdiction may be declined if maintenance of the suit will be vexatious or oppressive, but holds that the facts there appearing do not lead to that conclusion, "whether the availability of witnesses or any other aspect of a trial be considered." The decision of this court in *Gilbert v. Gulf Oil Corporation,* handed down herewith, is to the same effect. Hence we think that the district court had discretion to decline jurisdiction, and on the undisputed facts no abuse of discretion has been made to appear. See *Charter Shipping Co. v. Bowring,* 281 U. S. 515. On that ground the judgment is affirmed.

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CLARK, *Circuit Judge* (dissenting).

*Williams v. Green Bay & Western R. Co.,* S. Ct.,

Jan. 7, 1946, reversed the exercise of discretion by the trial court, D. C. S. D. N. Y., 59 F. Supp. 98, affirmed by this court, 2 Cir., 147 F.2d 777, to restrict the doctrine of *forum non conveniens* in narrow limits in cases claimed to involve interference with the internal affairs of a foreign corporation. While doing so, it clearly implied further disapproval of the reaches of *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, decided by a divided court and ever since the subject of critical comment. *Cf. Cohen v. American Window Glass Co.*, 2 Cir., 126 F.2d 111, 113, 114; Frank, J., dissenting in the *Williams* case, 2 Cir., 147 F.2d 777, 781. The *Williams* case cannot therefore serve as authority for an extension of the doctrine admittedly going beyond that recognized even in the locale most hospitable to it, New York; indeed, quite the contrary.

As we pointed out in *Gilbert v. Gulf Oil Corp.*, 2 Cir., Feb. 4, 1946—another attempt to extend the doctrine even beyond the New York precedents—it seems a serious thing for federal judges of their own initiative to introduce a limitation of the authorized diversity jurisdiction of the federal courts to that district only where most of the witnesses seem likely to be. It may well be a matter of interest to Congress, as in the proposed revision of the Judicial Code which now purports both to *extend* the venue of actions against foreign corporations and to grant a discretionary power of transfer "for the convenience of parties and witnesses." *Gilbert v. Gulf Oil Corp., supra.* But it is another thing for a court to say to a plaintiff that even though Congress has specifically provided that you may sue a defendant duly served

in your home district, 28 U. S. C. A. §112, you may not do so if it will inconvenience your adversary. And even the legislative body may hesitate to change the existing statutes upon examining some of the grounds here relied on for a denial of jurisdiction: the small amount of the plaintiff's investment, the supposed lack of hotel accommodations in this metropolitan area, the fact that defendant, like most large corporations today, does business and can be sued in many federal districts, and that it is a large corporation at its home base. Such considerations might lead legislators to think that the usually assigned reason for this jurisdiction, the avoidance of local prejudice, has still a sphere of operation.

To date the operation of the doctrine of refusal of jurisdiction otherwise granted seems to have been limited in the federal courts to the case of supervision of a corporation, noted above, and the quite special admiralty doctrine of refusing adjudication of claims between "foreigners" (real foreign litigants, not merely citizens of another state). *The Belgenland*, 114, U. S. 355; *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U. S. 515. And perhaps there is still open the question which troubled us in *Gilbert v. Gulf Oil Corp., supra*, namely, whether we should take over the special New York rule applied there in personal injury and death damage cases. This represents a great extension of the rule beyond anything I have been able to discover. If it is to be done at all, it should be in an unusually "vexatious or oppressive" case, as the terms were used in *Williams v. Green Bay & Western R. Co., supra,* S. Ct. , : But

this case, like the *Gilbert* case, illustrates the quite natural, indeed human, tendency of the district court to accept vague generalities as an excuse for avoiding a perhaps protracted litigation. Outside of the considerations mentioned above, which are surely immaterial, if not prejudicial to a fair examination of the point, the only ground seems to be the contention of the Casualty Company (the real beneficiary of the action, albeit the only moving party here) that it has many record books, as well as officers, located in Chicago. As I try to pierce these generalities, I find very little; indeed, it seems likely that the records can and should be summarized in written form and that the case may turn upon issues of law upon agreed or undisputed facts as to the employment of the company's president and of his separate company for unusual remuneration and commissions. Outside of his own testimony which it probably lies in his power to limit to a deposition if he so chooses, F. R. 26 (d), the amount of oral testimony and of disputed evidence of any sort seems limited. I question the power and policy involved in introducing into the law a limitation upon federal jurisdiction of this kind, and certainly of doing so upon the basis of such vague and general affidavits as these.